84-27

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No. .....

In the Supreme Court of the United States

OCTOBER TERM, 1983

IVAN L. SIDNEY, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on Behalf of the Hopi Indian Tribe and all Villages, Clans, and Individual Members of the Hopi Tribe,

Petitioner,

v.

EVELYN JAMES, a Traditional Leader and Spokesperson of the San Juan Southern Paiute Tribe, and the SAN JUAN SOUTHERN PAIUTE TRIBE, for and on behalf of the San Juan Southern Paiute Tribe and all Villages, Clans, and Individual Members of the San Juan Southern Paiute Tribe,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Paiute respondents, most of whom are enrolled members of the Navajo Indian Tribe, are entitled to intervene as a separate "tribe" in this quiet title lawsuit authorized by 25 U.S.C. § 640d-7(a) (1982) between the Hopi and Navajo Tribes, given that:

(a) No remedial jurisdiction has been authorized by Congress to enable the Paiute respondents to participate in this case, and the existing parties are shielded from implied remedial relief by tribal sovereign immunity;

(b) All members of the Paiute respondents who are enrolled in the Navajo Tribe are by law (25 U.S.C. §640d-7(a)) already represented in this case by the defendant Navajo Tribal Chairman; and

(c) All of the other members of the Paiute respondents who are not members of the Navajo Tribe are, by statute, to receive land allotments on the lands in issue by administrative action (25 U.S.C. §640d-8) (1982).

2. Whether the attempted intervention by the Paiute respondents was "timely" under Fed.R.Civ.P. 24(a), given that:

(a) Intervention was sought more than seven and one-half years after commencement of this action; and

(b) During the pendency of the case, interlocutory judgments defining the standards of decision in this case have been entered and appealed, and such judgments, by their nature, will not apply to the Paiute respondents, thereby necessitating the relitigation of all such determinations if intervention is allowed.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the petition contains a full identification of the petitioner, who is the plaintiff and was an appellee before the court of appeals.

The caption of the petition also contains a full identification of the Paiute respondents, who were applicants for intervention in the district court and who were appellants before the court of appeals.

The caption of the petition does not contain an identification of the defendant in the case, who was also an appellee before the court of appeals. That party is identified as follows:

> PETERSON ZAH, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on behalf of the Navajo Indian Tribe and all Villages, Clans, and Individual Members of the Navajo Tribe.

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RELIEF REQUESTED

Petitioner, Ivan L. Sidney, in his representative capacity on behalf of the Hopi Indian Tribe and its individual members, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this case on December 20, 1983.

OPINIONS IN THE COURTS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is contained in an unreported memorandum opinion filed December 20, 1983. *See* Appendix A hereto. That opinion reverses the unreported order of the United States District Court for the District of Arizona which had denied the Paiute respondents' motion to intervene. *See* Appendix B hereto.

JURISDICTION

The decision of the court of appeals was entered on December 20, 1983. *See* Appendix A hereto. Petitioner filed a timely petition for rehearing which was denied on April 12, 1984. *See* Appendix C hereto. No order has been entered extending the time for this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1982).

STATUTORY PROVISIONS INVOLVED

This case depends upon construction of Pub. L. No. 93-531, 88 Stat. 1712 (1974), as amended by Pub. L. No. 96-305, 94 Stat. 929 (1980) (codified at 25 U.S.C.

§§640d - 640d-28 (1982)), the pertinent provisions of which are set forth in Appendix D hereto.

STATEMENT OF THE CASE AND OF THE MATERIAL FACTS

This is a congressionally authorized quiet title action between the Hopi and Navajo Indian Tribes which appear in this case through their respective tribal chairmen as litigation representatives on behalf of their tribes and the individual members of their tribes. 25 U.S.C. § 640d-7. *See Sekaquaptewa v. MacDonald*, 448 F.Supp. 1183, 1187 (D. Ariz. 1978), *aff'd in part, rev'd in part, and remanded*, 619 F.2d 801 (9th Cir. 1980), *cert. denied*, 449 U.S. 1010 (1980). *See also Sekaquaptewa v. MacDonald*, 591 F.2d 1289 (9th Cir. 1979).[1] The lands in issue are the major part (approximately 7.5 million acres) of the Indian reservation land in Arizona commonly known as the "Navajo Indian Reservation."

The respondents Evelyn James and the so-called "San Juan Southern Paiute Tribe" (herein referred to as the "Paiute respondents") are a group of individuals of claimed Paiute Indian ancestry who are attempting to intervene as a separate "tribe" in this case between the Hopi and Navajo Tribes. It was conceded by the respondents before the court of appeals that the "San Juan Southern Paiute Tribe" is not a federally recognized Indian tribe, though it has petitioned the Department of the Interior to become federally recognized under 25

[1] The present tribal chairmen, Ivan L. Sidney (Hopi) and Peterson Zah (Navajo), have been substituted for the prior tribal chairmen Abbott Sekaquaptewa (Hopi) and Peter MacDonald (Navajo). Fed. R.Civ.P. 25(d)(1).

C.F.R. Part 83 (1983) (procedures for establishing that an American Indian group exists as an Indian tribe).[2]

While the record contains no evidence as to the exact number of purported members claimed to be in the Paiute respondents' group, counsel for the Paiute respondents conceded at oral argument before the court of appeals that all but "eight to eleven" members of the group, though of claimed Paiute Indian ancestry, are now enrolled members of the defendant Navajo Indian Tribe. Intervention is sought, however, for a separate "tribe" composed of both those Paiutes enrolled in the Navajo Tribe and those "eight to eleven" individuals not so enrolled. Before the court of appeals, counsel for the Paiute respondents asserted that those Paiutes who are enrolled in the Navajo Tribe would "disenroll," if necessary, to support their participation in this case.[3] In 1979, however, the United States Court of Appeals for the Ninth Circuit held that all members of the Navajo Tribe were required to be represented by the Navajo Tribal Chairman in this case, and that separate intervention

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[2] All of the recent congressional definitions of Indian "tribe" have required federal recognition. See 25 U.S.C. §1301(1), §1452(c), §1603(d), §1801(2), §1903(8), §2019(10) (1982). In order to become federally recognized, the Paiute respondents will have to demonstrate, among other things, that "the membership of the petitioning group is composed principally of persons who are not members of any other North American Indian tribe." 25 C.F.R. §83.7(f) (1983). See infra.

[3] While there may be members of the Navajo Tribe who are of Paiute ancestry who would be willing to give up their membership in the Navajo Tribe in order to become affiliated with the Paiute respondents, there is no guarantee that any would choose to leave the large and powerful Navajo Tribe to become affiliated with the small, unrecognized, land-less Paiute respondents.

by members of the Navajo Tribe is contrary to the intent of Congress. *See Sekaquaptewa v. MacDonald*, 591 F.2d 1289 (9th Cir. 1979).

This case was commenced in December of 1974, within days after the signing of the enabling legislation, 25 U.S.C. § 640d-7 (App. D). Because the nature of the claims of the Hopi and Navajo Tribes depended upon the construction of the Act of June 14, 1934, Pub.L.No. 73-352, 48 Stat. 960 (the "1934 Act") (App. E), which set apart the lands in issue as a statutory Indian reservation, the United States District Court for the District of Arizona reserved decision on the extent of the tribal interests until a decision could be made on the meaning, intent, and effect of the 1934 Act in the context of the conflicting claims of the two tribes. The Hopi and Navajo Tribes each undertook extensive archival and legislative research on the question of the meaning and effect of the 1934 Act in light of their respective claims. Each tribe presented its contentions to the district court by means of cross-motions for partial summary judgment on that preliminary issue.

On April 5, 1978, the district court entered a memorandum and order disposing of the cross-motions for summary judgment regarding the meaning and effect of the 1934 Act, in the context of the Hopi and Navajo Tribes' claims. *See Sekaquaptewa v. MacDonald*, 448 F.Supp. 1183 (D. Ariz. 1978). The district court affirmed the propriety of the tribal chairmen acting as litigation representatives on behalf of both the tribes and the individual members of the tribes. That opinion con-

cluded that all of the property described in the 1934 Act and not excluded by the complaint was in issue in this case and that the "Hopi . . . are holders of equitable interests" in such lands under the terms of the 1934 Act. *See* 448 F.Supp. at 1193. Based upon a review of the legislative history of the 1934 Act, the court concluded that Congress intended that the Hopi Tribe receive an interest in lands occupied, possessed, or used by Hopi Indians in 1934. No consideration was given to the possible interest of, or congressional intent in 1934 regarding, any San Juan Southern Paiute Indians.

On appeal to the court of appeals, the interlocutory decision of the district court was affirmed, except for the formula which Congress intended in 1934 to apply to the determination of the extent of the Hopi interest in lands exclusively occupied, possessed, or used by Hopi Indians in 1934. That decision of the court of appeals was announced May 23, 1980. *See Sekaquaptewa v. MacDonald*, 619 F.2d 801 (9th Cir. 1980), *cert. denied*, 449 U.S. 1010 (1980).

Following those decisions, the Hopi and Navajo parties proceeded with the very difficult task of gathering facts relevant to the question of which members of which tribe were using, occupying, or possessing the millions of acres of lands in issue in 1934. This task, which is nearing conclusion at present, has involved extensive archival research into government and other historical records, and the interviewing of hundreds of Hopi and Navajo witnesses, many of whom speak little or no English, and many of whom have now been deposed.

At no time has this process included research or inquiry into the location of San Juan Southern Paiute Indians in 1934.

Until the most recent decision of the court of appeals in this case was announced, a pretrial conference was to have been scheduled for sometime after March 1, 1984. To date, no such conference has been held as a result of the uncertainty surrounding the Paiute participation.

The Paiute respondents' motion to intervene as defendants in this case was filed with the district court on August 6, 1982, over seven and one-half years after the case was filed. The existing Hopi and Navajo parties each filed memoranda in opposition to the motion. That opposition was based on lack of subject matter jurisdiction, tribal sovereign immunity, and the untimeliness of the motion under Fed.R.Civ.P.24(a). On November 22, 1982, the district court held oral argument on the motion to intervene. The motion to intervene was denied on the basis of lack of jurisdiction and on the alternative basis that the "motion or request is denied because it simply comes too late in an already complicated case." Transcript 11/22/82, at 28 (App. B).

On appeal by the Paiute respondents to the United States Court of Appeals for the Ninth Circuit, the order denying the motion to intervene was reversed. The reversal was based on a determination that the Hopi and Navajo Tribes had not demonstrated sufficient prejudice to support a finding that the motion to intervene was not

timely. As to subject matter jurisdiction, the court of appeals determined that the district court erred in not holding an evidentiary hearing on the question of whether the Paiutes are a "tribe" under 25 U.S.C. § 640d-7(a), prior to ruling on the question of subject matter jurisdiction. *See* App. A.

One judge of the court of appeals dissented from the decision to reverse, stating that the motion to intervene was not timely, that the existing parties would clearly be prejudiced by the delay which intervention would cause, and that, on the basis of 25 U.S.C. § 640d-8, Congress did not intend these Paiutes to participate in this case as a "tribe." *See* App. A.

Petitioner's and the Navajo defendant's petitions for rehearing were denied by the court of appeals on April 12, 1984. *See* App. C.

Because the decision of the court of appeals opens the door to possible full participation by the Paiute respondents, vying for a share of the lands in issue, petitioner seeks review of the decision of the court of appeals.

REASONS AND ARGUMENT FOR GRANTING THE PETITION

I.

This Court Should Determine Whether 25 U.S.C. § 640d-7(a) Authorizes The Respondents To Participate In This Case, Particularly Where Congress Has Provided A Specific Administrative Remedy For Paiute Indians To Obtain An Interest In The Lands In Issue.

This case is believed to be one of the largest quiet title actions in the history of this country. It has taken the Hopi and Navajo Tribes over nine years of continuous litigation, discovery, and pretrial preparation to reach a point in this complicated case where the holding of a pretrial conference was anticipated. The Paiute respondents, nearly all of whom are already members of the Navajo Tribe, seek now to intervene in this case as a separate "tribe" entitled to vie for a share of the millions of acres of Indian reservation lands in issue. If allowed to intervene, the Paiutes who are members of the Navajo Tribe have stated that they will "disenroll" from the Navajo Tribe, if necessary, to support their participation in this case. That intervention, if allowed, will delay this case for several additional years and will greatly prejudice the Hopi and Navajo Tribes.

The special jurisdiction and waiver of tribal immunity for this case was provided by Congress in 1974. *See* 25 U.S.C. § 640d-7(a) (App. D):

> *Either tribe,* acting through the chairman of its tribal council for and on behalf of the tribe, is each hereby authorized to commence or defend in the District Court an action *against the other tribe and any other tribe of Indians claiming any interest in or to the area described in the Act of June 14, 1934,* except the reservation established by the Executive Order of December 16, 1882, for the purpose of determining the rights and interests *of the tribes* in and to such lands and quieting title thereto *in the tribes.* (Emphasis added.)

The term "tribes" is specifically defined for purposes of

the Act to mean "the Hopi and Navajo Tribes." 25 U.S.C. § 640d(a) (1982) (App. D).

Whether the reference to "any other tribe of Indians" in 25 U.S.C. §640d-7(a) was intended to open up this case to these Paiute respondents is a substantial federal question previously unaddressed by this Court. Congress, instead, has given specific statutory instruction as to how Paiute claims in the lands in issue in this case should be handled. *See* 25 U.S.C. § 640d-8 (App. D):

> Notwithstanding any other provision of this Act, the Secretary [of the Interior] is authorized to allot in severalty to *individual Paiute Indians, not now members of the Navajo Tribe,* who are located within the area described in the Act of June 14, 1934 (48 Stat. 960) [App. E], and who were located within such area, or are direct descendants of Paiute Indians who were located within such area, on the date of such Act, land in quantities as specified in section 331 of this title [25 U.S.C. §331], and patents shall be issued to them for such lands having the legal effect and declaring that the United States holds such land in trust for the sole use and benefit of each allottee and, following his death, of his heirs according to the laws of the State of Arizona. (Emphasis added.)

Congress has thus expressly dealt with the two categories of Paiute Indians who make up the respondent group. Those "eight to eleven" Paiute Indians in the respondent group who are not already members of the Navajo Tribe are to be given land allotments on the lands in question "notwithstanding" the ultimate division of those lands

between the Hopi and Navajo Tribes in this case. That process is to be accomplished administratively, by the Secretary of the Interior, and not judicially in this case.

As to the remaining members of the Paiute respondents' group, 25 U.S.C. §640d-8 demonstrates that their membership in the Navajo Tribe was known to Congress in 1974. In 25 U.S.C. § 640d-7(b) (App. D), Congress specifically provided the way that all the land claims of all members of the Navajo Tribe are to be handled:

> Lands, if any, in which the Navajo Tribe or *Navajo individuals* are determined by the District Court to have the exclusive interests shall continue to be a part of the Navajo Reservation. . . . Any lands in which the Navajo and Hopi Tribes or *Navajo* or Hopi *individuals* are determined to have a joint or individual interest shall be partitioned by the District Court on the basis of fairness and equity and the area so partitioned shall be retained in the Navajo Reservation or added to the Hopi Reservation, respectively. (Emphasis added.)

It has already been determined that the defendant Navajo Chairman represents all members of the Navajo Tribe in this case, presumably including all of the Navajo-enrolled Paiutes in the respondent group. *See Sekaquaptewa v. MacDonald,* 448 F.Supp. 1183, 1187 (D. Ariz. 1978), *aff'd in part, rev'd in part, and remanded,* 619 F.2d 801 (9th Cir. 1980), *cert. denied,* 449 U.S. 1010 (1980); *Sekaquaptewa v. MacDonald,* 591 F.2d 1289 (9th Cir. 1979). *See also Sekaquaptewa v. MacDonald,* 544 F.2d 396, 403 (9th Cir. 1976), *cert. denied,* 430 U.S. 931

(1977) (approval of tribal chairman representation of individual Navajos in related inter-tribal land litigation). Congress cannot reasonably have intended that such individuals be represented twice in this case, as members of two different "tribes."

Significantly, no jurisdiction is granted in the 1974 Act or otherwise to award any of the subject lands to the Paiute respondents, even if they could prove that they are a "tribe," and even if §640d-7(a) were to be determined to extend jurisdiction to other tribes besides the Hopi and Navajo.[4] The existing Hopi and Navajo parties are otherwise shielded from the Paiute respondents' claims to the lands by their tribal sovereign immunity. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Sekaquaptewa v. MacDonald*, 591 F.2d 1289 (9th Cir. 1979).

This Court has previously recognized the importance of providing definitive interpretations of disputed federal laws dealing with the division of substantial properties among competing Indians or Indian groups. *See*,

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[4] In addition to providing for the lands in dispute to be added only to the Hopi and Navajo Reservations, the 1974 Act provides for the establishment of a trust relationship only as to the Hopi and Navajo lands, 25 U.S.C. §640d-9(a) and (b) (1982), and only the Hopi and Navajo Tribes are authorized to exchange reservation lands. 25 U.S.C. §640d-22 (1982). A review of the Act in its entirety reveals a congressional concern only for the Hopi and Navajo interests. Indeed, when Congress intends to legislatively provide for the recognition of an unrecognized Indian group and the creation of a land base for such a group, it does so expressly, in a carefully controlled manner. See, e.g., 25 U.S.C. §§761-768 (1982) (Paiute Indians of Utah: Restoration of Federal Supervision), especially §766 (land base to be restored by subsequent congressional action after preparation of a tribal plan).

e.g., Tooahnippah v. Hickel, 397 U.S. 598 (1970) (dispute under an Indian will; construction of federal law giving the Secretary of the Interior authority to approve Indian will); *United States v. Jim,* 409 U.S. 80 (1972) (dispute over the disposition of royalties from Indian lands; construction of federal law providing for the disposition of royalties from Indian reservation lands); *Northern Cheyenne Tribe v. Hollowbreast,* 425 U.S. 649 (1976) (dispute over mineral deposits on Indian reservation; construction of federal law dealing with mineral interests of Indian allottees); and *Delaware Tribal Business Committees v. Weeks,* 430 U.S. 73 (1977) (dispute over the division of Indian claims judgment among competing Indian groups).

Petitioner submits that Congress did not intend for this group of Paiute respondents to participate in this case as a "tribe." The decision of the court of appeals for which review is sought opens the door to such participation. Congress instead intended that the members of the Paiute group who are not members of the Navajo Tribe receive individual allotments through administrative procedures before the Secretary of the Interior, and that the Navajo-enrolled Paiutes participate in this case only through the Navajo Tribal Chairman, together with all of the other members of the Navajo Tribe.

Because of the size, nature, and importance of this case, and because of the delays which would result from allowing intervention, the latest decision of the court of appeals in this case is appropriate for further review by the Supreme Court.

II.

Allowing Intervention Would Be A Gross Violation Of The Timeliness Requirement Of Fed.R.Civ.P. 24(a).

Fed.R.Civ.P. 24(a) permits intervention of right for parties otherwise meeting the requirements of that Rule, only "upon timely application." That requirement applies to Indians no less than to other parties. *See United States v. Alpine Land and Reservoir Co.*, 431 F.2d 763, 767 (9th Cir. 1970), *cert. denied*, 401 U.S. 909 (1971).

At the time the Paiute respondents applied for intervention, this case had been in active litigation and discovery for over seven and one half years (now almost ten years). During that period, an interlocutory judgment had been entered and appealed which defines the standards under which the case is now proceeding between the Hopi and Navajo Tribes. Because of the particular legislative history upon which the judgment was based, that judgment would not apply to the question of how the claims of the Paiute petitioners should be handled in this case. The judgment was entered in the context of the unique claims of the Hopi Tribe and on the basis of the particular legislative history concerning meetings with, and promises made to, the Hopi Indians in 1934. *See Sekaquaptewa v. MacDonald*, 448 F.Supp. 1183, 1194-95 (D. Ariz. 1978), *aff'd in part, rev'd in part, and remanded*, 619 F.2d 801 (9th Cir. 1980), *cert. denied*, 449 U.S. 1010 (1980).

Thus, if allowed to intervene, the Paiute respondents

could not simply enter this case as they find it, at this stage of the litigation. Unless the decision of the court of appeals is reversed, the district court will have to conduct an evidentiary hearing on Paiute "tribalness," and if the respondents are determined to be a "tribe" and are allowed to intervene, the court and the parties will have to relitigate virtually all of what has occurred in more than nine years of litigation, discovery, and trial preparation in this case, in light of the Paiute claims. That process, including the inevitable interlocutory appeals, would unquestionably add many additional years to this case.

On the basis of the foregoing, the district court which is most familiar with this case held that the attempted intervention was untimely: "[T]he motion or request is denied because it simply comes too late in an already complicated case." Transcript 11/22/82, at 28 (App. B). Contrary to the standards set forth in *NAACP v. New York*, 413 U.S. 345 (1973), the court of appeals substituted its judgment on the timeliness issue for that of the district court:

> Timeliness [under Fed.R.Civ.P. 24] is to be determined from all the circumstances. And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

Id. 413 U.S. at 366. *See also* Moore's Federal Practice, Vol. 3B, Par. 24.13.

For the court of appeals to hold that the motion to intervene was timely under the circumstances of this case renders the word "timely" in Rule 24 virtually meaningless. Further review by the Supreme Court is appropriate both to reaffirm the plain meaning of that term in Rule 24(a), and to correct the error of the court of appeals in substituting its judgment on timeliness for that of the district court.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the memorandum opinion of the United States Court of Appeals for the Ninth Circuit.

DATED this 5th day of July, 1984.

Respectfully submitted,

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APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-1511
DC No. CV 74-842
MEMORANDUM

IVAN L. SIDNEY, etc.,

Plaintiff/Appellee,

v.

PETERSON ZAH, etc.,

Defendant/Appellee,

and

EVELYN JAMES, etc., and SAN JUAN SOUTHERN PAIUTE TRIBE, etc.,

Applicants for Intervention/Appellants.

Appeal from the United States District Court
for the District of Arizona
William P. Copple, District Judge, Presiding
Argued and Submitted October 13, 1983
Before: SCHROEDER and FERGUSON, Circuit Judges, and STEPHENS,* District Judge

Evelyn James, spokesperson of the San Juan Southern Paiute Tribe, and the San Juan Southern Paiute

*Hon. Albert Lee Stephens, Jr., Senior United States District Judge for the Central District of California, sitting by designation.

The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of Ninth Circuit for disposition by written opinion. Accordingly, pursuant to Rule 21, it is ordered that disposition be by memorandum, foregoing publication in the **Federal Reporter**, and that this memorandum may not be cited to this court as precedent.

Tribe (hereafter collectively referred to as "Paiutes") appeal the denial of their motion to intervene in a quiet title action between the Hopi and Navajo Indian tribes. We reverse the order of the district court denying the intervention.

1. *Timeliness of the Motion to Intervene.*

The district court abused its discretion in denying the Paiutes' motion to intervene as untimely. *See Cummings v. United States,* 704 F.2d 437, 440 (9th Cir. 1983). The Paiutes' motion was for intervention as a matter of right. Fed. R. Civ. P. 24(a)(2). *See County of Fresno v. Andrus,* 622 F.2d 436 (9th Cir. 1980). Intervention-of-right motions are to be treated more leniently than permissive intervention motions because serious harm from the denial of the motion is more likely. *Alaniz v. Tillie Lewis Foods,* 572 F.2d 657, 659 (9th Cir.) (per curiam), *cert. denied,* 439 U.S. 837 (1978).

The wise administration of justice, including conservation of judicial resources and comprehensive disposition of litigation, demands that this possible flaw on the title of the Navajos and Hopis be cleared up as soon as possible. *Cf. Colorado River Water Conservation District v. United States,* 424 U.S. 800, 817 (1976). Even though a significant amount of time elapsed between the filing of the lawsuit and the Paiutes' motion to intervene, neither the Hopis nor the Navajos could demonstrate sufficient prejudice to prevent the Paiutes from intervening. *See Alaniz,* 572 F.2d at 659; *Cummings,* 704 F.2d at 441. Additionally, the denial of the Paiutes' right to intervene in this action may practically impair

the Paiutes' ability to assert their rights in a future action.

2. *Subject Matter Jurisdiction*

We review freely as a question of law the district court's denial of intervention for lack of subject matter jurisdiction, *Societe de Conditionnement en Aluminium v. Hunter Engineering Co.*, 655 F.2d 938, 941 (9th Cir. 1981), and find that the district court erred. The Paiutes allege that they are a "tribe" and thus that they fall within the explicit grant of district court jurisdiction under 25 U.S.C. § 640d-7(a). When, as here, the question of jurisdiction is so intertwined with the merits of the action, it was inappropriate for the district court to find that there was no subject matter jurisdiction without holding an evidentiary hearing on that issue. *See Sun Valley Gas v. Ernst Enterprises, Inc.*, 711 F.2d 138, 139-40 (9th Cir. 1983).

3. *Jurisdiction over the Appeal*

The Hopis' allegation that this court lacks jurisdiction over the appeal because no appealable judgment or order has been entered is without merit. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384-88 (1978).

REVERSED.

Dissent in Sidney v. James, No. 83-1511
SCHROEDER, Circuit Judge, Dissenting.

I respectfully dissent. In my opinion the district court did not abuse its discretion in denying intervention in this eight-year-old action when intervention could well

result in delay and repetition of extensive and expensive discovery. Any delay would represent a special hardship to the parties because Congress imposed a statutory freeze on all development on the Reservation lands until this litigation is completed. 25 U.S.C. § 640d-9(f) (1976). I also agree with the district court that in enacting the 1974 Act Congress did not intend to give the district court jurisdiction to consider tribal claims of these Paiutes when it treated them not as a tribe but as individuals in 25 U.S.C. §640d-8 (1976). Consequently, I would affirm the district court.

[Filed Dec. 20, 1983, by Phillip B. Winberry, Clerk, U.S. Court of Appeals]

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IVAN SIDNEY, etc.,

Plaintiff,

vs.

PETER MacDONALD, etc.,

Defendant.

EVELYN JAMES, etc., et al.,

Applicants for Intervention.

TRANSCRIPT OF PROCEEDINGS

Before: HONORABLE WILLIAM P. COPPLE, Judge
Phoenix, Arizona
November 22, 1982
10:00 o'clock a.m.

Appearances:

For the Plaintiff: Mr. Scott C. Pugsley

For the Defendant: Mr. Terry Fenzl

For the Applicants
for Intervention: Mr. Terry L. Pechota

****

THE COURT: Very well. The motions regarding the affidavits, documents 172 and 177, are denied.

The motion to intervene is denied first on the basis of jurisdiction, lack of jurisdiction; and if the Court is wrong in that, under the permissive intervention section, the motion or request is denied because it simply comes too late in an already complicated case.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-1511
DC No. CV 74-842
ORDER

IVAN L. SIDNEY, etc.,

Plaintiff/Appellee,

v.

PETERSON ZAH, etc.,

Defendant/Appellee,

and

EVELYN JAMES, etc., and SAN JUAN SOUTHERN PAIUTE TRIBE, etc.,

Applicants for Intervention/Appellants.

Before: SCHROEDER and FERGUSON, Circuit Judges, and STEPHENS,* District Judge.

A majority of the members of the panel has voted to deny the petition for rehearing. Judge Schroeder has voted to grant the petition. With reference to the suggestion for rehearing en banc, Judges Schroeder and Ferguson have voted to reject the suggestion and Judge Stephens recommends such rejection.

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*Hon. Albert Lee Stephens, Jr., Senior United States District Judge, Central District of California, sitting by designation.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

[Filed April 12, 1984 by Phillip B. Winberry, Clerk, U.S. Court of Appeals]

APPENDIX D

Act of Dec. 22, 1974, Pub.L.No. 93-531, §§1(a), 8 and 9, 88 Stat. 1712, 1715-16 (1974), as amended by Pub.L.No. 96-305, §2, 94 Stat. 929 (1980) (codified at 25 U.S.C. §640d(a), §640d-7, and §640d-8 (1982)):

> Sec.1(a) [25 U.S.C. §640d(a)] Within thirty days after December 22, 1974, the Director of the Federal Mediation and Conciliation Service shall appoint a Mediator (hereinafter referred to as the "Mediator") who shall assist in the negotiatons for the settlement and partition of the relative rights and interests, as determined by the decision in the case of Healing v. Jones (210 F. Supp. 125, D. Ariz., 1962, aff'd, 363 U.S. 758, 1963) (hereinafter referred to as the "Healing case"), of the Hopi and Navajo Tribes (hereinafter referred to as the "tribes") to and in the lands within the reservation established by the executive order of December 16, 1882, except land management district no. 6 (such lands hereinafter referred to as the "joint use area") . . . .
>
> Sec. 8. [25 U.S.C. §640d-7] (a) Either tribe, acting through the chairman of its tribal council for and on behalf of the tribe, is hereby authorized to commence or defend in the District Court an action against the other tribe and any other tribe of Indians claiming any interest in or to the area described in the Act of June 14, 1934, except the reservation established by the Executive

Order of December 16, 1882, for the purpose of determining the rights and interests of the tribes in and to such lands and quieting title thereto in the tribes.

(b) Lands, if any, in which the Navajo Tribe or Navajo individuals are determined by the District Court to have the exclusive interest shall continue to be a part of the Navajo Reservation. Lands, if any, in which the Hopi Tribe, including any Hopi village or clan thereof, or Hopi individuals are determined by the District Court to have the exclusive interest shall thereafter be a reservation for the Hopi Tribe. Any lands in which the Navajo and Hopi Tribes or Navajo or Hopi individuals are determined to have a joint or undivided interest shall be partitioned by the District Court on the basis of fairness and equity and the area so partitioned shall be retained in the Navajo Reservation or added to the Hopi Reservation, respectively.

(c)(1) Either as a part of or in a proceeding supplementary to the action authorized in subsection (a) of this section, either tribe, through the chairman of its tribal council for and on behalf of the tribe, including all villages, clans, and individual members thereof, may prosecute or defend an action for the type of relief, including interest, specified in section 18 of this Act [25 U.S.C. §640d-17], including all subsections thereof, against the other tribe, through its tribal chair-

man in a like representative capacity, and against the United States as to the type of recovery specified in subsection (a)(3) of such section 18 [25 U.S.C. §640d-17] and subject to the same provisions as contained in said subsection, such action to apply to the lands in issue in the reservation established by the Act of June 14, 1934 (48 Stat. 960).

(2) In the event the Hopi Tribe or Navajo Tribe is determined to have any interest in the lands in issue, the right of either tribe to recover hereunder shall be based upon that percentage of the total sums collected, use made, waste committed, and other amounts of recovery, which is equal to the percentage of lands in issue in which either tribe is determined to have such interest.

(3) Neither laches nor the statute of limitations shall constitute a defense to such proceedings if they are either prosecuted as a part of the action authorized by this section or in a proceeding supplemental thereto, if instituted not later than twenty-four months following a final order of partition and exhaustion of appeals in an action filed pursuant to this section.

(d) Nothing in this section shall be deemed to be a Congressional determination of the merits of the conflicting claims to the lands that are subject to adjudication pursuant to this section, or to affect the liability of the United States, if any, under litigation now pending before the Indian Claims Commission.

(e) The Secretary of the Interior is authorized to pay any or all appropriate legal fees, court costs, and other related expenses arising out of, or in connection with, the commencing of, or defending against, any action brought by the Navajo or Hopi Tribe under this section.

Sec. 9. [25 U.S.C. § 640d-8] Notwithstanding any other provision of this Act, the Secretary is authorized to allot in severalty to individual Paiute Indians, not now members of the Navajo Tribe, who are located within the area described in the Act of June 14, 1934 (48 Stat. 960), and who were located within such area, or are direct descendants of Paiute Indians who were located within such area, on the date of such Act, land in quantities as specified in section 1 of the Act of February 8, 1887 (24 Stat. 388), as amended [25 U.S.C. §331], and patents shall be issued to them for such lands having the legal effect and declaring that the United States holds such land in trust for the sole use and benefit of each allottee and, following his death, of his heirs according to the laws of the State of Arizona.

APPENDIX E

Act of June 14, 1934, Pub.L.No. 73-352, 48 Stat. 960:

AN ACT

To define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the exterior boundaries of the Navajo Indian Reservation, in Arizona, be, and they are hereby, defined as follows: [legal description omitted.]

****

All vacant, unreserved, and unappropriated public lands, including all temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882. There are hereby excluded from the reservation as above defined all lands heretofore designated by the Secretary of the Interior pursuant to section 28 of the Arizona Enabling Act of June 20, 1910 (36 Stat.L. 575), as being valuable for water-power purposes and all lands withdrawn or classified as power-site lands, saving to the Indians, nevertheless, the exclusive right to occupy and use such designated and classified lands until they shall be required for power purposes or other uses under the

authority of the United States: *Provided,* That nothing in this Act contained shall be construed as authorizing the payment of proceeds or royalties to the Navajo Indians from water power developed within the areas added to the Navajo Indians from water power developed within the areas added to the Navajo Reservation pursuant to section 1 of this Act; and the Federal Water Power Act of June 10, 1920 (41 Stat.L. 1063), and amendments thereto, shall operate for the benefit of the State of Arizona as if such lands were vacant, unreserved, and unappropriated public lands. All valid rights and claims initiated under the public land laws prior to approval hereof involving any lands within the areas so defined, shall not be affected by this Act.

Sec. 2. The Secretary of the Interior is hereby authorized in his discretion, under rules and regulations to be prescribed by him, to accept relinquishments and reconveyances to the United States of such privately owned lands, as in his opinion are desirable for and should be reserved for the use and benefit of the Navajo Tribe of Indians, including patented and nonpatented Indian allotments and selections, within the counties of Apache, Navajo, and Coconino, Arizona; and any Indian so relinquishing his or her right shall be entitled to make lieu selections within the areas consolidated for Indian purposes by this Act. Upon conveyance to the United States of a good and sufficient title to any such privately owned land, except Indian allotments and selections, the owners thereof, or their assigns, are hereby authorized, under regulations of the Secretary of the Interior, to select from the unappropriated, unreserved, and non-mineral public

lands of the United States within said counties in the State of Arizona lands approximately equal in value to the lands thus conveyed, and where surrendered lands contain springs or living waters, selection of other lands taken in lieu thereof may be of like character or quality, such values to be determined by the Secretary of the Interior, who is hereby authorized to issue patents for the lieu lands so selected. In all selections of lieu lands under section 2 of this Act notice to any interested party shall be by publication. Any privately owned lands relinquished to the United States under section 2 of this Act shall be held in trust for the Navajo Tribe of Indians; and relinquishments in Navajo County. Arizona, excluding Indian allotments and selections, shall not extend south of the township line between townships 20 and 21 north. Gila and Salt River base and meridian. The State of Arizona may relinquish such tracts of school land within the boundary of the Navajo Reservation, as defined by section 1 of this Act, as it may see fit in favor of said Indians, and shall have the right to select other unreserved and non-mineral public lands contiguous or noncontiguous, located within the three counties involved equal in value to that relinquished, said lieu selections to be made in the same manner as is provided for in the Arizona Enabling Act of June 20, 1910 (36 Stat.L. 558), except as to the payment of fees or commissions which are hereby waived. Pending the completion of exchanges and consolidations authorized by section 2 of this Act, no further allotments of public lands to Navajo Indians shall be made in the counties of Apache, Navajo and Coconino, Arizona, nor shall further Indian homesteads be initiated or allowed in said counties to

Navajo Indians under the Act of July 4, 1884 (23 Stat.L. 96); and thereafter should allotments to Navajo Indians be made within the above-named counties, they shall be confined to land within the boundaries defined by section 1 of this Act.

Sec. 3. Upon the completion of exchanges and consolidations authorized by section 2 of this Act, the State of Arizona may, under rules and regulations to be prescribed by the Secretary of the Interior, relinquish to the United States such of its remaining school lands in Coconino, Navajo, and Apache Counties as it may see fit; and shall have the right to select from the vacant, unreserved, and nonmineral public lands in said counties lieu lands equal in value to those relinquished without the payment of fees or commissions.

Sec. 4. For the purpose of purchasing privately owned lands, together with the improvements thereon, within the boundaries above defined, there is hereby authorized to be appropriated, from any funds in the Treasury not otherwise appropriated, the sum of $481,-879.38, which sum shall be reimbursable from funds accruing to the Navajo tribal funds as and when such funds accrue and shall remain available until expended: *Provided,* That title to the land so purchased may, in the discretion of the Secretary of the Interior, be taken for the surface only: *Provided further,* That said funds may be used in purchasing improvements on any land within said boundaries or on leased State school land within the boundaries above defined, provided the State of Arizona agrees to the assignment of said leases to

the Navajo Tribe of Indians on a renewable and preferential basis, and provided the Legislature of said State enacts such laws as may be necessary to avail itself of the exchange provisions contained in section 2 of this Act, and disclaim any right, title, or interest in and to any improvements on said lands.

Approved, June 14, 1934.